UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC., D/B/A/ BFI NEWBY
ISLAND RECYCLERY,

Employer,

and Case 32-RC-109684

FPR-II, LLC, D/B/A LEADPOINT
BUSINESS SERVICES,

Employer,

and

SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Petitioner.

PETITIONER'S RESPONSIVE BRIEF

In Support of Review of the Acting
Regional Director's Decision and Direction of Election

TEAGUE P. PATERSON, State Bar No. 226659
SUSAN K. GAREA, State Bar No. 260407
BEESON TAYER & BODINE
483 Ninth Street, Suite 200
Oakland, CA 94607
Telephone: (510) 625-9700
Facsimile: (510) 625-8275
sgarea@beesontayer.com
tpaterson@beesontayer.com

Attorneys for Petitioner
SANITARY TRUCK DRIVERS AND HELPERS LOCAL 350,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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I. INTRODUCTION

Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery ("BFI"), FPR-II, LLC, d/b/a Leadpoint Business Services ("Leadpoint") and various amici submitted briefs urging the Board to adhere to its current joint-employer standard. All sides agree that the joint-employer concept should apply when "two or more business entities are in fact separate, but that they share or codetermine those matters governing the essential terms and conditions of employment" which turns on whether the employer "meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction." *See* Amicus Brief of the Chamber of Commerce ("Chamber"), pp. 2-3 (citing *Laerco*, 269 NLRB at 325; *TLI*, 271 NLRB at 798; *Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964); *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1122-25 (3d Cir. 1982)). However, Petitioner and various amici offering support for Petitioner, assert the Board has strayed from this standard in its application; and it has drifted away from the Act, as well as agency and common law principles, in its application of *TLI* and *Laerco*. It is the Board's subsequent addition, without explanation or justification, of a paramount requirement of "direct and immediate" control over employees -- by both employers -- that is inconsistent with the Act and its purpose. In this regard Petitioner and Respondents diverge. In Petitioners' view it is not only appropriate, but a statutory requirement, to ask in the joint-employment setting: "Who supervises the supervisors?"

The opposition briefs, and the amici that assert corporate or management interests, are in lockstep. In their view a putative joint-employer's control over employment matters must be "direct and immediate." The opposition errs by articulating a precedent that includes a "direct and immediate control," as if such a requirement were part and parcel to the joint-employer standard articulated in *TLI* and *Laerco*. They also cite to amorphously-described concepts of agency and common law. As detailed below, the Board's application of its current standard has departed from the Act's agency and common-law underpinning, and these principles require a return to a broader

standard.

As Petitioner described more fully in its opening brief, the Board's current application of the joint-employer standard conflicts with the purpose and text of the Act. The opposition briefs fail to reconcile the contradiction between the current standard, as applied, and the terms of the Act. Some opposition parties have even re-drafted the Act, or relied solely on legislative comments that are contradicted by the statute actually adopted by Congress. The opposition briefs do little more than request a blind adherence to a standard articulated and applied by the Regional Director because, they incorrectly argue, it has been the standard for thirty years.

The joint-employer analysis must conform to the joint-employer standard and the Act and, therefore, must capture all entities that meaningfully effect employees' terms and conditions of employment. To this end, the Board must consider the indirect control exercised or authorized by a user-employer over its supplier-employer's employees. As required by the Supreme Court, the Board cannot ignore, and must consider, industrial realities when evaluating the user employer's control and authority. The analysis urged by Petitioner and the amici parties supporting Petitioner, will not expand the touchstone of the analysis, which should remain unchanged. Rather, the analysis we urge will ensure the Board complies with its mandate to enforce the Act.

The broader standard urged by Petitioners would not result in the "parade of horribles" mustered in the opposition briefs. Indeed, they are predicated on straw-man arguments that Petitioner has not forwarded. In their worst form, they exaggerate and distort Petitioner's viewpoint such that all subcontractors -- of any type -- would be considered a joint employer under the Act. These doomsday scenarios are speculative and unsupported. A more inclusive factual analysis that considers indirect control, authority and industrial reality, was utilized by the Board in the past without calamitous results and is currently utilized by courts and federal agencies in determining joint employment relationships under almost all other federal and state statutes that employ a joint-employer analysis under agency and common law principles.

Focusing on the facts presented here, the labor relations arrangement requires a finding of joint-employment. As described in the Petitioner's Opening Brief, BFI runs a recycling facility and has entered into a labor-only cost-plus contract with Leadpoint (a staffing agency) to provide the labor necessary to manually sort product along its BFI-owned and operated material streams. Contrary to the classic subcontracting scenarios described in several amicus briefs, BFI has not subcontracted for short-term temporary labor, nor has it subcontracted for labor to perform ancillary or discrete skilled work without interference or oversight by the contractor. Rather BFI runs its core recycling business using temporary employees. Consistent with this arrangement, the agreement between BFI and Leadpoint reserves to BFI extensive authority over the Leadpoint-supplied employees and their terms and conditions of employment. While Leadpoint functions as a "vendor on premises," the Leadpoint supervisors act as low-level supervisors in the chain of authority controlled by BFI.[1] BFI exercises daily, minute-by-minute control over the unit employees by dictating the hours of work, what work will be done, the total number of employees that will perform the work, and how it will be performed by allocating the work to each position, and operating the material streams on which the unit employees work to control work and break time throughout the day and the speed at which the machines operate. BFI exercises supervisory authority through the Leadpoint supervisors by conducting daily shift meetings, training, and giving directives throughout the workday. BFI monitors the operations throughout the day through its supervisors, its operations room, and walkie-talkie communication. BFI exercises its authority to intervene directly, where it deems necessary, to change the composition of a line, set and enforce work rules, train employees, or exclude unit employees from their premises. Absent from the record is even a single instance where Leadpoint has rejected or refused BFI's directions. The industrial realities and indicia of control of this arrangement are plain: both BFI and Leadpoint

[1] *See* Amicus Brief of the Labor Relations and Research Center, University of Massachusetts, Amherst, pp. 18-20, describing the "vendor-on-premises" model used in high-volume, concentrated deployment of temps which requires staffing agencies to be involved and integrated into the client's management.

share and co-determine the unit employees' terms and conditions of employment. The BFI/Leadpoint arrangement is consistent with the expansion of "permatemping" and the concomitant deprivation of statutory rights to bargain with the employer that controls their terms and conditions of employment under the Board's current application of its joint-employer standard.

II. ARGUMENT

A. In Their Opening Briefs, BFI and Leadpoint Omit and Diminish Facts that Establish BFI's Control[2]

Petitioner's Opening Brief provides a full recitation of the relevant facts. Here, Petitioner merely addresses the factual discrepancies Respondents have raised. BFI and Leadpoint attempt to frame themselves as two separate and independent operations. In reality, the Milpitas facility is an integrated single operation with Leadpoint supervisors folded in to BFI's operation as low-level supervisors. To avoid this conclusion, BFI and Leadpoint omit relevant facts from their briefs. They deemphasize BFI supervisors' role with respect to Leadpoint and its employees. For example, the parties omit the fact that swing-shift supervisor Augustin Ortiz spends 40% of his shift directly speaking to Leadpoint supervisors. *Compare* BFI's Opening Brief ("BFI Br."), p. 21 *and* Tr. 74:20-22. BFI and Leadpoint both ignore the fact that BFI supervisors are charged with ensuring that BFI's sorting operation runs efficiently and productively (Tr. 81:23-25) and, therefore, "oversee what needs to be done" on the sorting lines each shift and, to that end, direct Leadpoint's supervisors and conduct twice-daily pre-shift meetings with Leadpoint supervisors.

[2] The majority of amicus briefs submitted in support of Respondents, and arguing against any change to their formulation of the current joint-employer standard, do not address the first issue on which the Board sought review: whether Leadpoint solely employs the petitioned-for unit employees under the current standard. The two parties that do address this question add nothing to the debate. While the Chamber's Amicus Brief did briefly address this question, it relied solely on the Regional Director's findings, which the Petitioner contests, and does not examine the factual record. The Amicus Brief of American Staffing Association gave only a cursory review of the record and the only citation to the transcript does not support the contention that it was cited for. *See* Amicus Brief of the American Staffing Association, pp. 5-7.

(Tr. 90:9-12 (BFI supervisor describing that he sets up a "plan" for each shift for the unit employees' work); 75:6-10.)

BFI dismisses the direct interventions of its supervisors with Leadpoint employees as a "handful of examples." BFI Br., p. 21. Actually, the record evidence establishes that BFI supervisors regularly and consistently intervene when they witness a problem and the record provides more than a handful of concrete examples. See Petitioner's Br., pp. 16-17. Nonetheless, the number of interventions is immaterial because BFI supervisors intervene when necessary. Crucially, there is not a single instance of a Leadpoint refusal to comply with BFI's interventions. Given BFI's constant control over the unit employees' work, coupled with twice daily pre-shift meetings with Leadpoint supervisors, and regular oversight of the repetitive low-skill work, constant intervention is unnecessary.

BFI dismisses the control it exercises through its line operators and mechanics because they are not statutory supervisors. BFI Br., pp. 22, 26. However, BFI provides no citation to support its theory that only the actions of statutory supervisors are relevant to the joint-employer analysis. In Petitioner's view, the mechanism for communication of BFI's directives is immaterial; it is relevant that BFI has the authority to give such directives and exercises that authority.

BFI dismisses evidence that BFI sets the work locations because, BFI asserts, they are dictated by BFI's equipment, BFI Br., p. 28, though BFI exclusively controls the equipment and staffing of workstations. BFI omits reference to the evidence that days before the hearing, BFI directed specific staffing changes on the lines, reducing a particular line by two unit employees and directing where the remaining employees should stand and what work they should perform. Petitioner's Br., p. 9-11. BFI asserts that Leadpoint is "solely" in control of scheduling unit employees despite the record evidence that BFI sets the shift times and overtime hours, determines the number of employees who work and where they work. BFI Br., p. 36.

In brief, BFI asserts that Leadpoint "solely" controls various terms and conditions of employment, despite the evidence that BFI shares this control. For example, BFI asserts that "Leadpoint is solely responsible for training its employees," and then contradicts this assertion by admitting to BFI-conducted training of Leadpoint supervisors and self-described "anecdotal episodes" of BFI training unit employees directly. BFI Br., pp. 33-34. The record evidence establishes that BFI continuously trains unit employees as issues arise where it deems necessary. Petitioner's Br., pp. 14-17. There is no evidence that Leadpoint is involved in these decisions, or objected when BFI has exercised this authority.

Other factual errors in BFI's brief include the erroneous statement that Leadpoint has discretion over, and may or may not meet, the target headcount set by BFI. BFI Br., p. 37. BFI cites to page 110 of the transcript, which does not support this assertion. The record evidence establishes that Leadpoint does comply with BFI's headcount and is obligated to do so per the staffing agreement. (Tr. 36:13-19; 165:1-6.)

In its brief, BFI admits that it has the authority to reject any unit employees and to discontinue the use of unit employees for any or no reason. BFI Br., p. 9. BFI then asserts that it "has never actually rejected or dismissed a Leadpoint worker." BFI Br., p. 9. BFI cites to pages 63 and 181-182 of the transcript but neither of these citations support the assertion that the right has never been exercised. The documentary and testimony evidence establishes that BFI has exercised that authority on three occasions and on all three occasions Leadpoint complied. In fact, on pages 183-185 of the transcript, the Leadpoint CEO affirms that BFI does have the right to reject or discontinue the use of unit employees and is aware that BFI has exercised that right.

The record evidence also established that BFI can and does directly instruct unit employees, including setting new work rules for the unit employees. It did so just prior to the hearing, requiring unit employees to clean their work areas before they could begin their break. BFI asserts that this does not constitute a work rule because, "it is reasonable for customers to

expect that service providers' employees will leave their property clean." BFI Br., p. 20. The reasonableness of BFI's actions are not in question; it is the fact that BFI has the power to and has taken such actions that is significant. As articulated in Petitioner's opening brief, and on pages 17-22 of the AFL-CIO's amicus brief, the motivation behind BFI's control is not relevant. BFI then resorts to a strawman argument that considering this evidence here would mean that a homeowner could not ask their plumber's employees to wipe the kitchen floor after repairing a faucet. This makes little sense. Homeowners are not statutory employers. BFI's assignment of unit employees new job duties and work rules applies to the unit employees on an ongoing basis through the course of their employment in BFI's operations. They are not hired by to perform a specific task, like fixing a faucet.

BFI inartfully dismisses the evidence that it implemented a work rule regarding when unit employees can utilize the emergency stop controls by stating that "explaining the equipment to a service provider's employee who will be using it hardly constitutes a 'work rule.'" BFI Br., p. 20. This argument does not deny BFI exerts control, but merely attempts to substitute a reason for a conclusion. Under every other employer-employee analysis considered by adjudicative bodies (other than the Board), the fact that the employees are working on the user entity's equipment, and necessarily directed as to its use, is an indicia of control and employment. BFI next argues that because one unit employee once questioned -- and did not follow -- BFI's instructions, that the evidence of its control is diminished. In making this argument, BFI misrepresents the purpose of the training. All three BFI managers overseeing the unit work confirmed that they set, monitor and intervened to enforce its standards for using the emergency stop in order to minimize downtime and increase productivity. See Petitioner's Br., pp. 19-20. This evidence confirms that BFI can and does set work rules for the unit employees.

Finally, BFI makes several speculative and hypothetical arguments ungrounded in fact. For example, the record establishes that BFI controls the breaks of the unit employees, including what

time they are taken and their duration. BFI (and only BFI) decides when to stop the recycling lines for breaks, how long the break will last, and when to start the lines back up again. Leaadpoint cannot control the line operation. In its brief, however, BFI speculates, without citation to the record, that "Leadpoint may elect . . . to set its employees' shifts and breaks on the same schedule as its customers, that does not demonstrate" that BFI has any control over break times or working hours. BFI Br., p. 46. BFI has contracted with Leadpoint to provide its labor at specified times and does in fact set the shift times and break times of the unit employees. That BFI would suggest that this arrangement is simply for the convenience of Leadpoint, and nothing else, illustrates the failures of the Board's refusal to consider the industrial realities of the workplace. BFI is asking the Board to not only ignore "industrial realities" but also suggests it is appropriate to indulge its hypothetical ruminations over such realities. By asking the Board to ignore industrial or economic realities, BFI is asking the Board to ignore the facts presented when it asserts that Leadpoint "solely" controlled the terms and conditions of the unit employees' employment.

B. The Opposition's Argument that the Current Joint-Employer Standard Must Be Upheld Because It Is Longstanding and Clear Fails Because the "Direct and Immediate" Requirement was Added Without Justification and Is Inconsistent with the Act

1. The Opposition Briefs Ignore that the "Direct and Immediate" Requirement was Added to the Joint-Employer Standard Without Explanation or Justification

The opposition does not address the origins, or lack thereof, of the "direct and immediate" control requirement, nor its inconsistencies with the Act. Rather, they assert that it is a long-standing component of the current joint-employer standard and, on that basis alone, it must be robotically applied as a joint-employment litmus test. The Chamber's Amicus Brief exemplifies this folly.

The Chamber jumps from a paragraph that directly quotes the joint-employer standard broadly articulated the *TLI, Laerco, Browning-Ferris* and *Boire*, and then asserts, without any direct quotation, that "Joint-employer status then turns on the direct and immediate control over

the particular employees at issue . . . *Id*." Chamber Amicus Br., p. 3. This statement is simply an unsupported conclusion. Indeed, not one of the cited-to cases states that the joint-employer standard "turns on . . . direct and immediate control." In fact, not one of the cases contains the phrase "direct and immediate control." The "direct and immediate" language is first used by the Board in 2002, in *Airborne Freight Co.*, 338 NLRB 597 (2002). In other words, it is a new requirement, not long-standing. More importantly the *Airborne* Board simply cites *TLI* for this "direct and immediate" proposition, and provides no basis or justification for this dramatic change that, for the first time, posed this as an "essential element" of the joint-employer analysis. The Board did not, and never has, explained the amount of "direct and immediate" control necessary; nor has it ever disavowed its previous consideration of so-called "indirect" control, which has always been a recognized component of the analysis. The Board gave no explanation for this additional "direct and immediate" requirement which has the effect of both heightening the joint-employer standard and dramatically narrowing its focus. The Board simply added it in.

Not a single of the opposition briefs identifies any Board-articulated rationale for the change in application of the joint-employer standard. The opposition briefs, like the *Airborne* decision itself, simply assert a conclusion that the joint-employer standard "turns on" a finding of "direct and immediate" control, and that indicia of control that is indirect or authorized is irrelevant.

2. <u>The Opposition Briefs Ignore that the "Direct and Immediate" Control Requirement Is Inconsistent with the Act</u>

Several opposition briefs argue that a "direct and immediate" control requirement effectuates the Act's purpose by ensuring collective bargaining with employers that directly control employment matters. This circular argument presumes that the intention of the Act was to limit the duty to bargain to employers who *directly* control terms and conditions of employment. The text of the Act does not support this argument; nothing in the text of the Act limits employer

status to those entities exercising "direct and immediate" control over employment matters. Instead, the duty to bargain is placed on employers, a term which is defined expansively, and specifically contemplates joint employers. Several opposition briefs assert that the term "employer" must be defined pursuant to the common law of agency. If so, rather than supporting the current narrow standard, this argument undermines it because common law principles require consideration of both indirect control as well as practical and industrial realities (all of which are subsumed as employment indicia under the common law of agency).

a. *The "Direct and Immediate" Control Requirement Conflicts with the Act*

One of the purposes of the Act is to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 USC § 151. This purpose is furthered when employees are permitted to collectively bargain with statutory employers that meaningfully affect their terms and conditions of employment. The purpose of the Act is not served by excepting from the collective bargaining obligation entities that meaningfully affect employees' terms and conditions of employment, but do so "indirectly." It is the fact of meaningful control over employees' terms and conditions of employment that is relevant in furthering the purpose of the Act to facilitate collective bargaining, and not the way in which that control is exercised. Refusing to consider, as a rule, all types of control excludes entities that are necessary to meaningful collective bargaining. The current standard too-easily permits the creative structuring of entities for the purpose of disaggregating control over employees from the terms and conditions of their employment, and thereby avoids application of the Act. Evidently, and as this case exemplifies, maintenance of the current standard, which neglects consideration of "indirect control," is contrary to the purposes of the Act.

The Act defines "employer" broadly, including even persons that act as direct or indirect agents of an employer.[3] This broad conception of employer reflects Congressional intent to cover joint employment relationships. Nothing in the text of the Act supports a narrowing of the conception of an employer to those entities exercising "direct and immediate" control. The opposition briefs do not identify any support in the language or purpose of the Act for the requirement that a joint employer exercise "direct and immediate" control over employees.

One opposition brief argued that the legislative history of the Taft-Hartley amendments, which changed the definition of employee to exclude independent contractors, reflected a legislative intent to require the joint employer analysis to focus on "direct control." See Amicus Br. of Retail Litigation Center, Inc. ("RLC"), p. 5. In fact, the Taft-Hartley amendment to the definition of "employee" did not address or implicate any indicia of joint employment. Further, this argument conflicts with the application of the common law employer-employee standard, as described below, wherein indirect control is considered. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894 (1964) (Board must determine whether an entity exercises "sufficient" control over terms and conditions of employment to be an employer and not limited to direct control). That direct control may be relevant to the analysis does not make it necessary.

b. *The "Direct and Immediate" Control Requirement Conflicts with the Common Law of Agency; a Standard that Considers Indirect Control Is Consistent with the Common Law of Agency*

The Chamber and other amici argue that a joint-employer application that considers indirect control and industrial realities conflicts with the Act because the term "employer" must be

[3] We note that the Council on Labor Law Equality, in arguing against considering indirect control, quotes only a portion of the Act that defines employer, as follows, "any person acting as an *agent* of the employer." The quote is made to appear as if the definition ends, with a period, after the word employer, thus, eliminating a significant dependent clause and improperly obfuscating the fact that a clause has been omitted. The actual text of the Act reads "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly. . . ." 29 U.S.C. 152(2) (emphasis added). The omitted clause qualifying the term agent reflects a Congressional intent to include in the definition of employer both direct and indirect relationships. The RLC argues that because section 8(a)(5) makes it an unfair labor practice for an employer to refuse to engage in collective bargaining with a representative of "his employees," then the Act requires employees to be "direct hires." RLC Amicus Br., p. 17. Yet the RLC fails to consider that the term "employer" includes joint employers and an employer's direct and indirect agents. The RLC's interpretation of the Act is inconsistent with even the current application of the joint-employer standard.

interpreted in harmony with the common law of agency test for establishing an employer-employee relationship. See Chamber Amicus Br., pp. 6-9; Amicus Br. of American Staffing Association ("ASA"), p. 4 (incorrectly asserting that the current standard is consistent with common law agency principles). Unpacking this argument, however, reveals that interpreting the term "employer" with reference to the common law of agency supports Petitioner's argument that any joint-employer analysis must consider indirect control and industrial realities and is inconsistent with a joint-employer standard that turns on "direct and immediate control" over employment matters. Tellingly, the Chamber does not set forth the standard applied under the common law of agency, nor does it explain how the current joint-employer standard is consistent with it. Petitioner's advocacy for consideration of indirect control over terms and conditions of employment and industrial realities are consistent with the common-law employment standard.

The common law test, founded in agency, has always considered the "right to control" as opposed to evaluating *actual* control. The Supreme Court has explained the test as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751–752, 109 S.Ct., 2166 2178–2179 (1989) (footnotes omitted). Importantly, there is no "direct supervision" requirement under the common law of agency test and it is certainly not an essential element of the analysis.

Indeed, the common-law agency standard examines various indicia of control, including *indirect* control. For example, the common law agency test examines, *inter alia*, the "right to

control" the manner and means of production and whether the hiring party has the "right to" assign additional projects to the hired party. The "right" to control that is reserved, for example, in a staffing agreement should be considered under the common law of agency analysis, but this evidence is currently rejected by the Board in applying its joint-employer test as indirect. Further, the common law of agency test considers other indicia that tend to support an inference of control, but are not themselves examples of direct control, including, the location of the work; the duration of the relationship between the parties; the extent of the hired party's discretion over when and how long to work; and whether the work is party of the business of the hiring party. In sum, the common law agency standard requires consideration of indirect control, whereas the Board's current application of its joint-employer standard does not. *See, e.g.*, *Airborne Freight Co.*, 338 NLRB 597, 597, n.1 (2002) (describing the "essential element" of joint-employment as "whether a putative joint employer's control over employment matters is direct and immediate."). While the Chamber acknowledges that the common law test for agency requires that "all of the incidents of the relationship must be assessed and weighed with no one fact being decisive," (see Chamber Amicus Br., p. 3 citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)) it contradicts this statement by arguing that the currently-applied joint-employer standard comports with the law of agency notwithstanding its narrow focus on direct and immediate control over the employees.

The common law of agency standard of employment also considers industrial and practical realities. Under the common law standard, "[e]ven if actual control was absent, it is the right to control which is determinative." *Air Terminal Cab, Inc. v. U.S.*, 478 F.2d 575 (8th Cir. 1973 (finding taxi drivers employees under the common law test.) Thus, "[w]here the nature of a person's work requires little supervision, there is no need for actual control. Some occupations such as unloaders, *see McGuire v. United States*, 349 F.2d 644, 646 (9th Cir. 1965); *United States v. Kane*, 171 F.2d 54, 59 (8th Cir. 1948), or doctors, *Cody v. Ribicoff*, 289 F.2d 394 (8th Cir. 1961); *Flemming v. Huycke*, 284 F.2d 546 (9th Cir. 1960), are unsuited to direction and close

control by an employer." *Id.* In contrast to these holdings under common law principles, the Board now ignores industrial realities by requiring direct and immediate supervision, even where, as here, the nature of the work requires little direct supervision. Thus, where amici argue for adherence to common-law agency principles, they agree that the current standard, as applied here must be abandoned.

Moreover, Petitioner's advocacy for an additional path to establishing a joint-employer relationship where the agreement between the parties provides the user employer the right to control the supplier-employer (and/or its employees), is likewise consistent with the common law agency. If the Chamber believes that agency principles are an appropriate method for discerning an employment relationship, there can be no opposition to applying agency principles between entities, as required by section 2(2) of the Act, to determine the entities acting as an employer.

The Chamber of Commerce argues that by focusing on the common law of agency, "Congress has structured the Act to limit the expansion of industrial disputes in ever widening circles." Chamber Amicus Br., p. 13. This argument reveals a fundamental misunderstanding of agency law which is not immutable but, as a creature of common law, is susceptible to evolution. E.g. Restatement of Agency (Third), Introduction (2006). In any event, the current application of the joint employer standard is inconsistent with common law, and provides no support for the maintenance of that standard.

c. *The Opposition Briefs Fail to Justify Excluding Evidence of Control Based On Employer Motivation for Its Exercise*

In the Board's application of its current joint-employer standard, it rejects evidence of control (even direct control) through an improper analysis of the employer's motivation in exerting its control. To the extent an employer's exercise of control over employees' terms and conditions of employment is separate from the desire to control labor relations, the Board, inexplicably, rejects such evidence of control. Thus, as explained in the Petitioner's opening brief,

the Board will not consider an entity's right or exercise of the right to exclude employees from its premises (and, consequently, the bargaining unit) or promulgation and enforcement of safety rules, as evidence of control over the terms and conditions of employment because, in its view, that right is arguably exercised as a "property owner" and not as an employer. In the past, the Board has considered such indicia of control as indicative of an employment relationship, but ceased doing so without specifically overruling prior precedent or offering any reason for its departure. See Petitioner's Opening Brief, pp. 44-47.

The opposing briefs assert that the Board should continue to reject evidence of an employer's control where it is exercised to protect its premises, but do not offer any justification for this approach (apart from the assertion that it is the law, so it should stay that way). See, e.g., Chamber Amicus Br., p. 5; see also Amicus Br. of Council on Labor Law Equality ("COLLE"), pp. 2, 16-17 (arguing that the Board should not consider control exercised by a user to establish production, safety or other standards because "[c]ompanies have legitimate business reasons for including these types of terms in their agreements with suppliers and contractors"). The duty to bargain has never been predicated on a finding that an employer had an illegitimate or arbitrary reason for setting terms and conditions of employment. Rather, motivation is irrelevant. Moreover, intent is unknowable and ephemeral; every user-employer decision can be described with a motive unrelated to seeking to control terms and conditions of employment, but to protect the user-employer's profits, capital or business interests. Indeed, these motives are often overlapping. As the AFL-CIO cogently argues in its amicus brief, it is the fact of control, not the motivation for exerting the control that is relevant. See Amicus Br. of AFL-CIO, pp. 17-22. Notably, the common law agency test does not assess employer motivation, but looks to practical realities. Under the common law, the fact that a worker works on the premises on a continual basis is a strong indicator of an employer-employee relationship. In sum, a putative joint employer's motivation in exercising control over employees' terms and conditions of employment has no impact on the

question of whether it shares or codetermines them.

C. The Doomsday Scenarios Presented are Straw-Men that Do Not Withstand Scrutiny

As explained above, and more fully in Petitioner's Opening Brief, the Board had previously applied the joint-employer standard to encompass indirect control and industrial realities. During that time, the Board process and collective bargaining functioned and the American economy not only survived, but thrived. The opposition briefs ignore this history and trot out a parade-of-horribles that are not tethered to reality, nor responsive to Petitioner's arguments.

The Petitioner urges the Board to apply the joint-employer standard such that it lives up to its own, plain language, so as to bring to the table the entities that meaningful effect employees' terms and conditions of employment. The standard is inherently limited by the phrase "meaningfully effect" and the scope of section 9 of the Act. Consideration of facts that demonstrate indirect control or industrial realities merely allow the Board to capture *all* of the entities that meaningfully effect employees' terms and conditions of employment. In protesting any expansion of the criteria the Board examines in determining joint-employer standard, the opposition briefs make wild and specious claims about where such a standard will lead.

1. A Joint-Employer Standard that Considers Indirect Control and Industrial Realities Is Not Vague or Limitless

Several opposition briefs argue that an expansion of the joint-employer analysis to consider indirect control and industrial realities will render any business a joint employer if it enters into contracts that specify any direction as to the work performed, quality control, or that contains a cap on the payment for labor costs. This is not the case. In forwarding these types of arguments, the opposition conflates labor-only cost-plus contracts involving integrated management operations with any other contract that contains cost controls. See, e.g., Chamber Amicus Br., pp. 11-12 (noting that the price negotiated for a contract indirectly impacts wages "in

every owner-subcontractor agreement"). The pervasive domination in the cost-plus, labor-only, permatemp arrangements does not equate with a classic subcontracting arrangement. The joint-employer determination of whether an employer possesses sufficient control over employees to qualify as a joint employer "is essentially a factual issue." *Boire v. Greyhound Corp*., 376 U.S. 473, 481 (1964). This factual determination is made on the totality of the circumstances, and "a slight difference between two cases might tilt a case toward a finding of a joint employment." *Holyoke Visiting Nurses Association v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993); *see also Texas World Service v. NLRB*, 928 F.2d 1426, 1434 (5th Cir. 1991) ("minor differences in the underlying facts might justify different findings on the joint employer issue"). Given the fact-specific inquiry of the joint-employer analysis, the opposition cannot make accurate across-the-board pronouncements, as they have done in brief, that caps on labor costs in a contract will establish a joint-employer relationship. The ASA goes so far as to suggest that Walmart would be a joint-employer with all of its suppliers due to its market position. ASA Amicus Br., p. 12. Suggesting that consideration of indirect control and industrial realities will render Walmart the joint employer of all of its suppliers' employees is preposterous, not even joint-employer standards more liberal than that advocated here would make such a finding and these off-base, extreme hypotheticals add nothing to the discussion.

These straw men arguments, offered without academic or historical support, must be dismissed. Neither Petitioner nor amici are suggesting a joint-employer standard such that "virtually all sub-contractors should reasonably be viewed as joint employers," as described in the Chamber's brief. Chamber Amicus Br., p. 12. Similarly, BFI, in its brief, asserts that a homeowner could be the joint-employer of a plumber's employees by requiring that the repair work be completed during particular hours. The Coalition for a Democratic Workplace, et al. ("CDW") too describes subcontracting of discrete, skilled functions (such as technology management) that do not require the type of integrated control in the labor-only contract arrangements at issue here.

CDW ominously predicts that, "[A]ny entity that touches the employment relationship in some way, however remote" is in danger of being embroiled in a bargaining relationship. CDW Amicus Br., p. 2. The RLC similarly argues that any contract involving an "ultimate deliverable," such as logistics consulting or IT management would result in a joint-employer relationship. RLC Amicus Br., p. 19. No party has advocated such a broad standard. The opposition briefs describe true subcontracting relationships that do not entail a high degree of control between the two entities or over the supplier-employer's employees that implicates terms and conditions of employment. Indeed, as noted in Petitioner's opening brief, a subcontractor can be an agent or an independent entity of another. Whether, as a practical matter, agency exists between the two, or the arrangement reserves the right of control, is a salient delineation that eliminates the opposition's parade-of-horribles arguments. A joint-employer standard that considers indirect control will not impact these arrangements or create a boundless standard. Where a user-entity has truly subcontracted work by, for example, hiring a plumber to fix the pipes at its physical plant, the Petitioner's standard would not render the plumber's employees the employees of the user-entity. In this classic subcontracting arrangement, the user-entity is not in the plumbing business, does not concern itself with the manner and means of the work performed, does not provide any training on how to perform the work, the work is of a short duration and the plumbers' employees perform work for other user-entities. Thus, if a particular user-entity requires the subcontracted work to be performed at a specific time or place, but exercises no other control, this would not meet the standard of meaningfully effecting the plumber employees' terms and conditions of employment.

The labor-only, cost-plus arrangement between BFI and Leadpoint is markedly different from this traditional subcontracting. This is a specific type of subcontracting that by definition vests significant control with the user-entity. In these type of arrangements the staffing firm supplies only labor to work exclusively on the user-entity's physical plant or on the user-entity's

equipment that is under the sole control of the user-entity and income is derived solely from supplying labor to clients on a cost-plus basis (or a marked up hourly billing rate). The Amicus brief submitted by the Labor Relations and Research Center, University of Massachusetts, Amherst ("UMass Labor Center"), extensively describes the growth of these type of arrangements in the last ten years and how the nature of these agreements places the user-entity in the role of co-determining terms and conditions of employment of the supplier-employer's employees.

2. The Opposition Briefs' Claims that a Broader Standard Will Have Negative Impacts on Employers and the Economy are Speculative and Improper Considerations

The opposition briefs speculate as to various negative economic consequences of a joint-employer standard that actually complies with and effectuates the Act. This speculation is made without reference to or reliance on any academic research or statistics. COLLE suggests without support that returning to a correct joint-employer standard will result in job losses because employers will discontinue their use of temporary staffing agencies. This claim is not supported by any data. Moreover, the argument fails to demonstrate that a change in the joint-employer standard would decrease the demand for labor. Other opposition briefs threaten that jobs will migrate overseas. Again, this speculation is unsupported by research or data. Nor is there quantification of any supposed job loss.

In essence, these simply express a desire to avoid application of the Act. Threats of restructuring or diminished labor demand are not permissible considerations in interpreting the Act. The Act cannot be limited to accommodate employers' interests in avoiding statutory bargaining obligations. *Cf. Oakwood Care*, 343 NLRB 659, 664 (2004) (Liebman and Walsh, dissenting) ("however real the competitive pressures on American firms, their need to respond to economic uncertainty should not be permitted to erode their employee's right to union representation."). The Act is not a punishment; it is the result of Congressional findings that collective bargaining serves the public interest.

Several opposition briefs cite the fact that temporary staffing industry workers are a large and growing segment of the United States labor market. This fact, however, simply highlights the need for a rational joint-employer standard that complies with the Act to ensure that this growing percentage of the labor market has access to the full freedoms that the Act protects, including meaningful collective bargaining over terms and conditions of employment. Indeed, the difficulties presented by this triangulated workforce structure has created a second-tier workforce of employees working for lower wages and fewer benefits than the standard employees performing the exact same work. *See* UMass Labor Center Amicus Br., pp. 4-5; Amicus Brief of the National Employment Law Project, et al., pp. 8-19; Amicus Br. of National Council for Occupational Safety & Health, et al., pp. 30-36.

The opposition briefs also assert that a broader joint-employer standard will prevent user companies from insisting that supplier-employers protect safety or pay a living wage. *See* COLLE Amicus Br., pp. 3, 18-19. This argument is, again, pure speculation made without citation to research or evidence. Likely, the opposite is true, and the amicus brief submitted by workplace safety and health advocates rebuts this assertion. Temporary staffing is used to *avoid* such obligations, and recognizing a duty to bargain on the part of a host employer over safety and health issues both effectuates the Act and worker health and safety, both of which are statutorily-expressed priorities of the Federal government.

The Act provides and protects the collective bargaining opportunity and framework for employees to negotiate about safety or wages or other terms and conditions of employment. If user entities decide to retain control over the supplier-employees for operational or moral or branding reasons, Congress, through the Act, has clearly provided that such control should be exercised through collective bargaining.

3. Claims that a Broader Standard Will Delay Board Certification are Unsupported

Several opposition briefs assert that including considerations of indirect control and industrial realities will lengthen representation hearings and increase the number of challenges to certifications. This argument is speculative, unsupported by data or research and moreover, the Board previously considered such indirect criteria and no opposition brief pointed to any Board decisions that commented on or cited any such delays.

This argument is also illogical. The current joint-employer standard is as fact-intensive an inquiry as the common law agency test. Considering all indicia of control remains a fact-intensive inquiry. Moreover, under the current standard petitioners, like the Petitioner here, continue to present evidence of indirect control that regional directors assess and evaluate. The process of presenting the evidence will not change with a broader standard, just the weight given to such evidence. Cf. RLC Amicus Br., p. 10 ("This fact-based type of inquiry is what the Board, the regional directors, and administrative law judges do routinely.")

4. Claims that a Broader Standard Will Harm Bargaining are Disingenuous and Unfounded

Several opposition briefs argue that employees' interests will be harmed by including more joint employers at the bargaining table. See CDW Amicus Br., p. 22. One argument forwarded is that the different entities have different motivations which will make it harder for the parties to agree on terms and conditions of employment. This argument merely illustrates the necessity of including joint employers at the table. The joint employer, by definition, has control over employees' terms and conditions of employment whether or not they are required to come to the table. Requiring their presence at the table at least gives employees an opportunity to negotiate with the entities in control. These arguments must be rejected precisely because the purpose of the Act is to promote collective bargaining, while disavowing involvement in the results of such bargaining. The Act is founded on the principle that collective bargaining is a public good, and so

a more broadly-applied standard is a proper purpose, regardless of the complexities it might entail.

Another argument forwarded is that a broader standard will bring to the table entities that do not have the power to meaningfully effect terms and conditions of employment. This argument fails because the consideration of a broader array of indicia of control only changes the means of evaluating whether an entity meaningfully effects terms and conditions of employment. In other words, the standard advocated by Petitioner merely seeks to include all entities that meaningfully effect terms and conditions of employment, not entities that incidentally effect terms and conditions of employment.

The feigned concern with employees' ability to bargain is not persuasive. Employees can petition for recognition by naming a one or both of the joint employers. If the employees have determined that the alleged hassles of bargaining with two entities are outweighed by the benefits of bargaining with both entities that meaningfully effect their terms and conditions of employment, the Board should not act paternalistically to second-guess the efficacy of that decision.

A joint-employer standard that considers indirect control over employees' terms and conditions of employment and industrial realities comports with the language and purpose of the Act to effectuate meaningful bargaining and ensure employees can exercise the full freedom of association. In the instant case, for example, if employees are forced to bargain solely with Leadpoint, they are constrained in bargaining over shift times, breaks, overtime, hours of work, holidays, job classifications, job duties, the number of employees per shift, work rules, the speed of the machines on which the employees' work, facilities, equipment safety, hiring criteria, and wages. Where a user-employer maintains indirect control but that control is pervasive and ultimate, the user-employer is necessary for meaningful bargaining.

5. Claims that Under a Broader Standard Employers Will Be Unwittingly Liable for Unfair Labor Practices are Unavailing

Some opposition briefs argue that a broader joint-employer standard should be rejected because one employer can be held liable for its joint-employer's unfair labor practices. See, e.g., COLLE Amicus Br., pp. 19-20. This argument ignores the context in which this case arises. The parties are in a representation case proceeding for the purpose of determining what entity or entities are the employer of the unit employees. Bargaining obligations will only arise after a determination is made about the employer-employee status. All that is at issue in this case is whether BFI is a proper party in a representation case and thus would have a duty to bargain should the Union be certified. The scope of that duty is not before the Board now, nor is BFI's potential liability for any unfair labor practices committee by Leadpoint. In *Capitol EMI Music*, the Board demonstrated its sensitivity to the issue of unfair labor practice liability and recognized that joint employers should not necessarily be held jointly and severally liable for all unfair labor practice charges committed by one joint employer without the participation of the other. *Capitol EMI Music*, 311 NLRB 997 (1993) (Board did not impute the unlawful firing of an employee by one employer to the joint employer where the joint employer did not know or should not have known of the unlawful motivation in firing). Moreover, the Act specifically provides for the protection of employees with respect to unfair labor practices committed by others than their direct employer. Thus the term employee "shall not be limited to the employees of a particular employer." 29 U.S.C. § 152(2). Therefore, a user employer is already liable for unfair practices committed as a result of its directives to supplier employers, and a finding of joint employment status may actually militate such liability via the process of collective bargaining rather than unilateral action.

D. Arguments that Change Is Inappropriate are Unavailing

Several opposition briefs argue that the Board should not act here because circumstances have not changed since the Board declined in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000) to reformulate the joint-employer standard, so as to justify revisiting the standard, and, they note the dramatic expansion of temporary staffing arrangements is not a "change." See, e.g., COLLE Amicus Br., p. 11; CDW Amicus Br., pp. 7, 15-16. This self-serving description of the American labor market is made without citation to authority or research or statistics. Moreover, where, as here, the current joint-employer standard, as applied, conflicts with the Act, change is required.

There have, in fact, been significant and relevant changes in the labor market since *Sturgis*. Temporary staffing has not only continued its rapid expansion, but its nature and structure has evolved. See UMass Labor Center Amicus Br., pp. 8-10. The "permatemp" structure -- where workers are deployed to perform core business functions at user facilities for an indefinite period of time -- has mushroomed since *Sturgis*. UMass Labor Center Amicus Br., pp. 8-10. Simultaneously, the expansion of the fissured workplace has led to increased workplace problems and exploitations. UMass Labor Center Amicus Br., pp. 10-12. A permatemp relationship -- unlike short-term temporary staffing used to cover seasonal upticks or employee leaves, or traditional subcontracting of non-core business needs -- vests the user with control over the temporary employees' terms and conditions of employment because the user maintains control over the operation of its core business and the permatemps work exclusively and indefinitely on the user's premises and equipment. The expansion of the use of permatemps highlights the need for the Board to employ a joint-employer that enables employees to bargain with the entities that meaningfully effect their terms and conditions of employment.

Several opposition briefs argue that any change to the joint-employer standard would subvert the Administrative Procedure Act rulemaking process. See, e.g., Chamber Amicus Br., p. 15; ASA Amicus Br., pp. 15-16. The Board, like our courts, regularly establishes principles

through caselaw adjudication. The Supreme Court has recognized that this is entirely appropriate. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426 (1969) ("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.")

BFI argues that any change in the joint-employer standard should not be applied to the instant case because that would unfairly change the standard "midstream." This case, however, arises from a representation petition, the entire purpose of which is to determine, in the first instance, the bargaining obligations of the parties. No bargaining obligations have yet been created. Nor are there any pending unfair labor practice charges against either BFI or Leadpoint. Here, the boat has not left the dock, let alone reached midstream.

III. CONCLUSION

For the foregoing reasons, Petitioner submits that the joint-employer standard must be authorized by the terms of the Act and effectuate its purpose. To that end, the standard must be applied to consider direct and indirect control and industrial realities.

Dated: July 10, 2014

BEESON, TAYER & BODINE, APC

By: /s/Susan K. Garea
SUSAN K. GAREA
Attorneys for Teamsters Local 350

PROOF OF SERVICE

NATIONAL LABOR RELATIONS BOARD

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, 483 Ninth Street, Suite 200, Oakland, California 94607. On this day, I served the foregoing document:

PETITIONER'S RESPONSIVE BRIEF IN SUPPORT OF REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

☒ By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Thomas Stanek	Thomas.Stanek@ogletreedeakins.com
Elizabeth M. Townsend	Elizabeth.Townsend@ogletreedeakins.com
Michael G. Pedhirney	mpedhirney@littler.com

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, July 10, 2014.

/s/Tanya Gatt
Tanya Gatt, Legal Secretary